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Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Human rights implications of overincarceration and overcrowding

Report of the United Nations High Commissioner for Human Rights

Summary

The present report is submitted pursuant to Human Rights Council resolution 24/12. It contains an analysis of the human rights implications of overincarceration and overcrowding, drawing on the experience of United Nations and regional human rights mechanisms and in the light of the views provided by States, including on their practice regarding alternatives to detention, and other relevant stakeholders.

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I. Introduction

1. The first substantive right provided by the Universal Declaration of Human Rights, in its article 3, is the right to life, liberty and security of person. As stressed by the Human Rights Committee in paragraph 2 of its general comment No. 35, on article 9 of the International Covenant on Civil and Political Rights, the right to liberty and security of person is precious for its own sake, and also because the deprivation of liberty and security of person have historically been principal means for impairing the enjoyment of other rights.[1]

2. While the right to liberty of person is not an absolute right, any deprivation of liberty must not be arbitrary and must be carried out with respect for the rule of law.[2] As affirmed by the Human Rights Council in its resolution 24/12, detainees retain all of their human rights and fundamental freedoms, except for those lawful limitations that are demonstrably necessitated by the fact of incarceration.

3. According to recent statistics, more than 10.2 million people around the world are deprived of their liberty,[3] about 3 million of whom are awaiting trial.[4] Data further suggests that the number of prisoners exceeds official prison capacity in at least 114 countries, and that prisons in 92 of these countries hold between 100 and 200 per cent of their capacity, while 22 hold over double, even triple or nearly quadruple their capacity.[5] The levels of overcrowding in places of deprivation of liberty around the world have been described as endemic,[6] alarming,[7] extreme,[8] chronic[9] and outrageous,[10] and are said to be an indicator of, and contributor to, the global prison crisis.[11]

4. The phenomena of overcrowding and overincarceration are inherently intertwined. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment stated that "[t]he negative impact of the overuse of incarceration on human rights is manifold. The overuse of imprisonment constitutes one of the major underlying causes of overcrowding, which results in conditions that amount to ill-treatment or even torture".[12] Furthermore, numerous United Nations bodies and mechanisms, including the Security Council,[13] the Human Rights Committee,[14] the Committee against Torture,[15] the Subcommittee on Prevention of Torture,[16] the Working Group on Arbitrary Detention[17] and

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[1] See CCPR/C/GC/35, para. 2.
[2] See ibid., para. 10.
[3] See Roy Walmsley, World Prison Population List, 10th edition (London, International Centre for Prison Studies, 2013).
[4] See Roy Walmsley, World Pre-trial/Remand Imprisonment List, 2nd edition (London, International Centre for Prison Studies, 2014).
[5] See International Centre for Prison Studies, Highest to Lowest-Occupancy level (based on official capacity) (London, 2014).
[6] See CAT/OP/MLI/1, para. 49.
[7] See A/HRC/22/53/Add.2, para. 81; CAT/OP/BRA/1, para. 96.
[8] See CAT/OP/BEN/1, para. 147.
[9] See www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16033&LangID=E.
[10] See Council of Europe document CPT/Inf (2015) 6, para. 57.
[11] See A/65/273, para. 1.
[12] See A/68/295, para. 86.
[13] See, for example, Security Council resolution 2180 (2014), para. 16.
[14] See, for example, CAT/C/RWA/CO/1, para. 19, and CAT/C/TGO/CO/2, para. 13.
[15] See, for example, CAT/OP/HND/1, para. 198.
[16] See CAT/OP/MLI/1, para. 49; CAT/OP/MEX/1, para. 177; and CAT/OP/BEN/1, para. 147.
[17] See, for example, A/HRC/10/21, para. 42, and A/HRC/27/48, paras. 72-74.

regional human rights bodies[18] have all expressed serious concerns about overcrowding in places of deprivation of liberty and its negative impact on the human rights of detainees.

5. Overcrowding is not only a problem in prisons but also in other places in which individuals are deprived of their liberty. Article 4 of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines the term "deprivation of liberty" as encompassing any place under States' jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority, or at its instigation, or with its consent or acquiescence. This definition corresponds to the long-standing practice of international and regional human rights mechanisms, which have interpreted the term "deprivation of liberty" to include settings beyond the criminal justice sector.[19] The problem of overcrowding also extends to such settings, including psychiatric hospitals,[20] various centres for holding irregular migrants and asylum seekers,[21] including offshore centres for processing asylum claims,[22] and temporary airport holding facilities.[23]

6. The Human Rights Council, in its resolution 24/12, encouraged States to address overcrowding in detention facilities by taking effective measures. In the same resolution, it requested the United Nations High Commissioner for Human Rights to submit an analytical report on the human rights implications of overincarceration and overcrowding, drawing on the experience of United Nations and regional human rights mechanisms, seeking the views of States, including on their practice regarding alternatives to detention, and other relevant stakeholders. In response to a note verbale sent by the Office of the United Nations High Commissioner for Human Rights, 23 States and 22 other stakeholders submitted their views, which are available online.[24]

7. The present report contains an analysis of the human rights implications of overincarceration and overcrowding, including the impact of overincarceration and overcrowding on human rights, the main causes of overincarceration and overcrowding, recommendations on ways to address these issues and conclusions.

II. The impact of overincarceration and overcrowding on human rights

8. The main element that defines deprivation of liberty is the inability of those who are in detention to protect themselves, as their daily life is largely dependent on the decisions taken by personnel in detention facilities.[25] Therefore, when resorting to deprivation of liberty, a State undertakes a duty of care[26] and special responsibility[27] towards those held in

[18] See www.achpr.org/files/sessions/52nd/inter-act-reps/185/activity_report_prisons_eng.pdf, p. 8.
[19] CCPR/C/GC/35, para. 5.
[20] E/C.12/1/Add.80, para. 31; A/HRC/25/60/Add.1, para. 69; CAT/C/GHA/CO/1, para. 17; CAT/C/RUS/CO/4, para. 18; CAT/OP/MEX/1, para. 203; www.achpr.org/files/activity-reports/36/achpr54eos15_actrep36_2014_eng.pdf, para. VII.b(xv).
[21] E/C.12/DEU/CO/5, para. 13; A/HRC/13/30, para. 65; CAT/C/GRC/CO/5-6, para. 20; CAT/C/NOR/CO/6-7, para. 17; CCPR/C/FIN/CO/6, para. 10; www.achpr.org/files/sessions/37th/mission-reports/prisons-2004/misrep_specmec_priso_southafrica_2004_eng.pdf, p. 65.
[22] CAT/C/AUS/CO/4-5, para. 17.
[23] See Council of Europe document CPT/Inf (2014) 26, para. 73.
[24] www.ohchr.org/EN/Issues/RuleOfLaw/Pages/Overincarceration.aspx.
[25] A/HRC/10/21, para. 46.
[26] See Council of Europe document CPT/Inf (2015) 12, para. 54.

detention. Consequently, failure to fulfil this duty may entail State responsibility,[28] including international responsibility.[29] Except for those lawful limitations that are demonstrably necessitated by the fact of incarceration, State authorities should ensure that persons deprived of their liberty are able to enjoy all human rights.

A. Right to liberty and security

9. As stressed by the Human Rights Committee, the right to liberty and security of person applies to everyone, including those convicted of crime.[30] While States enjoy a wide margin of discretion in their choice of penal policy, the right to liberty of person articulated in article 9 of the International Covenant on Civil and Political Rights requires that, as a basic principle, States resort to the deprivation of liberty only insofar as it is necessary to meet a pressing societal need and in a manner proportionate to that need.[31] Moreover, any deprivation of liberty must not be arbitrary and must be carried out with respect for the rule of law.[32]

10. One of the fundamental safeguards against arbitrary deprivation of liberty is the right to bring proceedings before a court to challenge the lawfulness of detention, which is a self-standing[33] and non-derogable right.[34] In order to render this right effective, such principles as impartiality of the court reviewing the detention, assistance by a legal counsel, access to legal aid and authorities bearing the burden of proof must be observed.[35] Yet, numerous human rights bodies have reported serious infringements upon the right to liberty as individuals are detained without any justification,[36] those arrested are not promptly brought before a judge,[37] and a judicial decision regarding continued detention is not rendered swiftly.[38] Moreover, the ability of detainees to challenge their continued detention is frequently hindered owing to a lack of access to legal representation and legal aid and even the unavailability of judges.[39]

11. The Working Group on Arbitrary Detention stated that the principle that deprivation of liberty shall be imposed proportionately to meet a pressing public need is most relevant to detention pending trial.[40] This implies that pretrial detention should be a measure of last

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[27] See A/HRC/27/55, para. 51, *Caesar v. Trinidad and Tobago*, Inter-American Court of Human Rights Judgement (2005), para. 97, and communication Nos. 105/93–128/94–130/94–152/96, *Media Rights Agenda & Constitutional Rights Project v. Nigeria*, African Commission on Human and Peoples' Rights (1998), para. 91.

[28] See CCPR/C/GC/35, para. 8.

[29] See CAT/OP/MEX/1, para. 177.

[30] See CCPR/C/GC/35, para. 3.

[31] See E/CN.4/2006/7, para. 63.

[32] See CCPR/C/GC/35, para. 10.

[33] See A/HRC/30/37, para. 2.

[34] See A/HRC/30/37, paras. 22-25. See also CCPR/C/21/Rev.1/Add.11, paras. 11 and 16, and CCPR/C/GC/35, paras. 6-67.

[35] See A/HRC/30/37, guidelines 4, 8 and 14.

[36] See CAT/C/TGO/CO/2, para. 13.

[37] See www.achpr.org/files/sessions/37th/mission-reports/ethiopia/mistep_specmec_priso_ethiopia_2004_eng.pdf, pp. 24 and 25.

[38] See A/HRC/19/57, para. 53, and www.achpr.org/files/sessions/52nd/inter-act-reps/185/activty_report_prisons_eng.pdf, pp. 21 and 22.

[39] See CCPR/C/TUR/CO/1, para. 17; A/HRC/19/57, para. 63; A/HRC/10/21, para. 45; CAT/C/54/2, para. 91; and www.achpr.org/files/sessions/52nd/inter-act-reps/185/activty_report_prisons_eng.pdf, p. 10.

[40] See E/CN.4/2006/7, para. 64.

resort. However, international[41] and regional[42] bodies have expressed their concern over the increasing use of pretrial detention and its excessive length, noting its significant contribution to overcrowding,[43] leading to a situation where, in some prisons, pretrial detainees constitute the majority of the population.[44]

12. It has also been reported that, in some States, overcrowding makes it difficult to monitor the implementation of each sentence. This infringes upon the right to personal liberty of those who have already served their sentences and are not promptly released.[45]

13. Concerns have also been expressed over practices of preventive custody[46] and post-conviction preventive detention[47] employed by some States, which both infringe upon the right to liberty and contribute to the problem of overincarceration and overcrowding.

14. Authorities in charge of places of detention bear the duty of care towards detainees,[48] a duty often neglected as — due to overcrowding — prison resources are overstretched and staffing levels are inadequate for the numbers of detainees. This leads to serious breaches of the right to security of detainees and instances where authorities fail to protect detainees from inter-prisoner violence.[49] Due to overcrowding, tensions may also arise between the staff and detainees[50] with a potential serious impact on discipline,[51] leading to rule by the most powerful detainees,[52] riots, disturbances and hunger strikes in protest to the conditions of detention.[53] Furthermore, overcrowding in detention facilities may be so extreme that the authorities are unable to ensure the protection of detainees in case of such emergencies as floods and fire,[54] which in turn may infringe upon their right to life.[55]

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[41] See A/HRC/19/57, para. 48; CAT/C/54/2, para. 76; and CCPR/C/TUR/CO/1, para. 17.

[42] See www.achpr.org/files/sessions/12th-eo/mission-reports/promotion_mission-2012/mission_report_mauritania_cpta_eng.pdf, para. 38. See also Council of Europe document CPT/Inf (2014) 31, para. 56.

[43] See CAT/C/TGO/CO/2, para. 12, and CAT/OP/MLI/1, para. 29.

[44] See CAT/C/46/2, para. 52, and CAT/C/GTM/CO/5-6, para. 17.

[45] See CAT/C/RWA/CO/1, para. 19, and CAT/OP/PRY/1, para. 46.

[46] See A/HRC/27/48, paras. 78 and 79.

[47] See A/HRC/27/48, para. 75; A/HRC/4/25/Add.3, para. 7(f); and CAT/OP/BEN/1, para. 151.

[48] See Council of Europe document CPT/Inf (2015) 12, para. 54.

[49] See www.achpr.org/files/sessions/37th/mission-reports/prisons-2004/misrep_specmec_priso_southafrica_2004_eng.pdf, p. 53; and *Neptune v. Haiti*, Inter-American Court of Human Rights Judgement (2008), para. 137; CPT/Inf (2015) 12, para. 106. See also Council of Europe document CPT/Inf (2014) 26, para. 110; CAT/C/BGR/CO/4-5, para. 23; CAT/C/GTM/CO/5-6, para. 18; CAT/C/MEX/CO/5-6, para. 19; CCPR/C/BOL/CO/3, para. 20; and CAT/OP/MEX/1, para. 178.

[50] See Council of Europe document CPT/Inf (2014) 31, para. 56; A/HRC/25/60/Add.1, para. 19; and CAT/OP/BEN/1, para. 210.

[51] See CAT/OP/MLI/1, para. 49.

[52] See CAT/OP/MEX/1, para. 166; CAT/C/BGR/CO/4-5, para. 23; and Council of Europe document CPT/Inf (2015) 12, para. 54.

[53] See CAT/C/BOL/CO/2, para. 18, and CAT/C/MAR/CO/4, para. 19.

[54] See *Pacheco Teruel et al. v. Honduras*, Inter-American Court of Human Rights Judgement (2012), para. 96. See also Council of Europe document CPT/Inf (2014) 26, para. 102, and CAT/OP/MEX/1, para. 176.

[55] See *Pacheco Teruel et al. v. Honduras*, Inter-American Court of Human Rights Judgement (2012), para. 66.

B. Freedom from torture and other inhuman or degrading treatment or punishment

15. Overcrowding has been established to constitute a severe form of ill-treatment,[56] inhuman or degrading treatment[57] and even torture.[58] Poor material conditions are exacerbated by overcrowding and adversely affect all individuals living or working in places of detention. They contribute to tensions and deterioration of relations among prisoners and between prisoners and personnel, which in turn increase the risk of ill-treatment.[59]

16. Both international and regional human rights mechanisms have established breaches of the prohibition of torture due to overcrowding, as detainees are forced to live for prolonged periods in deplorable material conditions,[60] unsuitable for a humane and dignified existence,[61] with very poor hygiene and lacking out-of-cell activities,[62] adequate nutrition and access to health services.[63]

C. Right to health

17. States must respect the right to health and ensure equal access for all persons, including prisoners or detainees, to preventive, curative and palliative health services.[64] The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has specifically noted the link between overincarceration,[65] overcrowding and infringements upon the right to health,[66] especially in relation to the spread of infectious and communicable diseases, such as tuberculosis[67] and hepatitis C.[68] This poses risks not only to the health of other detainees, but also to the staff and even the general population once prisoners are being released.[69]

18. Other United Nations and regional human rights bodies have also reported the negative impact of overcrowding upon the right to health of detainees through denial of,[70]

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[56] See CAT/OP/BRA/1, para. 75.

[57] See Council of Europe documents CPT/Inf (92) 3, para. 46, and CPT/Inf (2014) 26, para. 100. See also www.achpr.org/files/sessions/12th-eo/mission-reports/promotion_mission-2012/mission_report_mauritania_cpta_eng.pdf, para. 112 (ix); *Kalashnikov v. Russia*, European Court of Human Rights Judgement (2002), para. 102; and *Ananyev and Others v. Russia*, European Court of Human Rights Judgement (2012), paras. 143-148.

[58] See CAT/OP/MLI/1, para. 49, and E/CN.4/2004/56, para. 49.

[59] See CAT/OP/MDV/1, para. 210.

[60] See CAT/OP/MLI/1, paras. 49, 80; CCPR/C/ALB/CO/2, para. 16; and communication No. 2218/2012, *Abdullayev v. Turkmenistan*, Views adopted by the Human Rights Committee on 25 March 2015, paras. 5.3 and 7.3. See also Council of Europe document CPT/Inf (2014) 15, para. 126, and *Boyce v. Barbados*, Inter-American Court of Human Rights Judgement (2007), para. 94.

[61] See A/68/295, para. 45, and *Montero-Aranguren v. Venezuela*, Inter-American Court of Human Rights Judgement (2006), para. 99.

[62] See CAT/OP/MEX/1, para. 184, and *Boyce v. Barbados*, Inter-American Court of Human Rights Judgement (2007), para. 94.

[63] See A/HRC/25/60/Add.1, para. 85.

[64] See A/65/255, para. 59.

[65] See A/65/255, para. 68.

[66] See A/HRC/23/41/Add.1, para. 43.

[67] See A/HRC/23/41/Add.1, para. 52.

[68] See A/65/255, para. 29.

[69] See A/HRC/23/41/Add.2, para. 31; A/65/255, para. 29; and CAT/C/54/2, para. 77.

[70] See A/HRC/22/53/Add.2, para. 66.

or inadequate access to medical treatment,[71] insufficient mental health services,[72] lack of health-care professionals in places of detention,[73] failure to implement effective harm-reduction programmes and drug-dependence treatment.[74] Overcrowding has also been found to be a root cause of entirely preventable medical conditions.[75]

19. There are also various factors associated with overcrowding that contribute to the denial of the right to health, such as poor natural light and ventilation in places of detention,[76] extreme temperatures,[77] poor hygiene and sanitation standards,[78] insufficient provision for personal hygiene,[79] and infestation with insects and vermin.[80] Ultimately, infringements on the right to health may adversely impact on the right to life of detainees.[81]

D. Right to food, water and sanitation

20. The Special Rapporteur on the human right to safe drinking water and sanitation emphasized that the lack of access to sanitation can be tantamount to inhuman or degrading treatment in certain circumstances, especially in the context of detention. The Special Rapporteur noted that overcrowding in places of detention can seriously hinder the ability of the authorities to ensure safe drinking water and proper sanitation.[82]

21. The Special Rapporteur on the right to food has highlighted the frequent infringements upon the right to adequate food of detainees[83] and emphasized State responsibility to provide those in detention with adequate food.[84] The Special Rapporteur has also underlined the negative impact of overcrowding on the right to food.[85]

22. Numerous other United Nations and regional human rights bodies have also reported serious infringements upon detainees' right to safe water and sanitation, as well as the right to food. These infringements, attributed to overcrowding, include failure of the State to provide adequate quality and quantity of food;[86] adequate washing[87] and toilet facilities;[88]

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[71] See CEDAW/C/GRC/CO/7, para. 34; CAT/C/BLR/CO/4, para. 19; CAT/C/ECU/CO/3, para. 24; CAT/C/GAB/CO/1, para. 17; and CAT/C/LKA/CO/3-4, para. 14.

[72] See A/HRC/23/41/Add.2, para. 40; and CAT/C/AUS/CO/4-5, para. 11.

[73] See CAT/C/GRC/CO/5-6, para. 14; and CAT/C/PER/CO/5-6, para. 10.

[74] See A/65/255, para. 29.

[75] See A/HRC/25/60/Add.1, para. 54; and www.achpr.org/files/sessions/12th-eo/mission-reports/promotion_mission-2012/mission_report_mauritania_cpta_eng.pdf, para. 76.

[76] See CAT/C/MDA/CO/2, para. 18; A/HRC/22/53/Add.2, para. 47; and *Tibi v. Ecuador*, Inter-American Court of Human Rights Judgement (2004), para. 150.

[77] See A/HRC/25/60/Add.1, para. 44; and CAT/OP/BEN/1, para. 180.

[78] See CAT/C/PER/CO/5-6, para. 10; CAT/C/SYR/CO/1, para. 30; and CAT/C/LKA/CO/3-4, para. 14.

[79] See A/HRC/25/60/Add.1, para. 54.

[80] See CAT/OP/BEN/1, para. 218; CAT/OP/BRA/1, para. 105; www.achpr.org/files/sessions/12th-eo/mission-reports/promotion_mission-2012/mission_report_mauritania_cpta_eng.pdf, para. 76; and Council of Europe document CPT/Inf (2015) 12, para. 66.

[81] See CAT/C/TGO/CO/2, para. 13.

[82] See A/HRC/12/24, paras. 45-47.

[83] See A/HRC/25/57/Add.1, paras. 70-72, 83(n), and A/HRC/22/50/Add.2, paras. 12-14.

[84] See A/HRC/22/50/Add.2, para. 13. See also CAT/OP/MEX/1, para. 112.

[85] See A/HRC/25/57/Add.1, paras. 70, and A/HRC/22/50/Add.2, para. 14.

[86] See CAT/C/BLR/CO/4, para. 19; CAT/C/BGR/CO/4-5, para. 21; CAT/C/KHM/CO/2, para. 19; CAT/C/GAB/CO/1, para. 17; CAT/C/MAR/CO/4, para. 19; and A/HRC/22/53/Add.2, para. 66.

[87] See www.achpr.org/files/sessions/37th/mission-reports/ethiopia/misrep_specmec_priso_ethopia_2004_eng.pdf, p. 20; A/HRC/25/60/Add.1, para. 54; and Council of Europe document CPT/Inf (2014) 26, para. 110.

safe drinking water[87] and sanitation,[88] including access to such basic hygiene products such as soap and toilet paper free of charge,[89] and adequate sleeping arrangements, including a clean mattress and bedding.[90]

23. Failure to ensure proper implementation of these rights has led to violations of other rights, including the right to safety and security, as inadequate food provision has led to tensions in places of detention and even violence,[91] as well as freedom from cruel, inhuman or degrading treatment.[94] Clean water supply, effective sewage and waste disposal, hygienic food preparation and general hygiene practices are all essential to a clean and healthy prison environment and to preventing and controlling the spread of disease,[95] and their absence can also negatively affect the right to health[96] and even the right to life.[97]

E. Right to education and rehabilitation

24. Underlining that detainees constitute a highly marginalized group facing endemic violations of their right to education, the Special Rapporteur on the right to education has emphasized the negative impact of overcrowding on the exercise of this right. Overcrowding puts significant strain on the available resources as demand exceeds the staff and facilities available.[98] It is common that people in places of detention are locked in overcrowded cells for 23 hours a day without any purposeful out-of-cell activity[99] and no rehabilitation programmes,[100] without possibilities to continue their education[101] or take part in skills development and vocational programmes.[102]

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[87] See www.achpr.org/files/sessions/37th/mission-reports/ethiopia/misrep_specmec_priso_ethopia_2004_eng.pdf, p. 33. See also Council of Europe document CPT/Inf (2014) 26, para. 110; A/HRC/25/71, para. 35; and CAT/OP/BEN/1, para. 208.

[88] See A/HRC/13/39/Add.5, para. 91; A/HRC/25/60/Add.1, para. 44; CCPR/C/BGR/CO/3, para. 18; and CCPR/C/NIC/CO/3, para. 17.

[89] See CAT/C/FIN/CO/5-6, para. 14; CAT/C/GRC/CO/5-6, para. 14; CAT/C/MDA/CO/2, para. 18; CCPR/C/JAM/CO/3, para. 23; CAT/OP/BEN/1, para. 208; and CPT/Inf (2014) 26, para. 101.

[91] See CAT/OP/BRA/1, para. 106; and CAT/OP/MEX/1, para. 187.

[92] See CAT/OP/PRY/1, para. 148; CAT/OP/BRA/1, para. 137; A/HRC/22/53/Add.2, para. 47; *Tibi v. Ecuador*, Inter-American Court of Human Rights Judgement (2004), para. 150; www.achpr.org/files/sessions/12th-eo-mission-reports/promotion_mission-2012/mission_report_mauritania_cpta_eng.pdf, para. 75; and Council of Europe document CPT/Inf (2015) 12, para. 65.

[93] See CAT/C/TGO/CO/2, para. 13; and CAT/OP/PRY/1, para. 183.

[94] See *Montero-Aranguren v. Venezuela*, Inter-American Court of Human Rights Judgement (2006), para. 99.

[95] See A/HRC/23/41/Add.1, para. 52.

[96] See CAT/C/PER/CO/5-6, para. 10; CAT/OP/BEN/1, para. 218; and www.achpr.org/files/sessions/37th/mission-reports/prisons-2004/misrep_specmec_priso_southafrica_2004_eng.pdf, p. 3.

[97] See CAT/C/TGO/CO/2, para. 13; and CCPR/C/MOZ/CO/1, para. 14.

[98] See A/HRC/11/8, para. 12; and Council of Europe document CPT/Inf (97) 10, para. 13.

[99] See *Boyce v. Barbados*, Inter-American Court of Human Rights Judgement (2007), para. 93-94; Council of Europe document CPT/Inf (2014) 26, para. 93; CAT/C/BGR/CO/4-5, para. 21; and A/HRC/13/39/Add.5, para. 234.

[100] See *Juvenile Reeducation Institute v. Paraguay*, Inter-American Court of Human Rights Judgement (2004), para. 134.24; Council of Europe document CPT/Inf (2014) 31, para. 56; A/HRC/25/60/Add.1, para. 85; and A/HRC/22/53/Add.2, para. 47.

[101] See CAT/OP/MEX/1, para. 170.

[102] See www.achpr.org/files/sessions/37th/mission-reports/prisons-2004/misrep_specmec_priso_southafrica_2004_eng.pdf, p. 54; and Council of Europe document CPT/Inf (2014) 21, para. 43.

25. Bearing in mind the importance of rehabilitation as an overarching aim of imprisonment, the adverse impact of overcrowding on the availability of rehabilitation services is of particular concern.[103]

F. Freedom of religion or belief

26. The Special Rapporteur on freedom of religion or belief has emphasized that all persons deprived of their liberty have the right to freedom of religion or belief.[104] Overcrowding has an adverse effect on all aspects of detention, which in turn negatively impacts detainees' freedom of religion or belief. Often there is insufficient space for religious practices,[105] the possibility to observe religious rituals on certain days is hindered,[106] religious scripts are unavailable[107] and there are reportedly problems with regard to the type of meals suitable for members of different faiths.[108]

G. Right to privacy, family life and rights of family members

27. Overincarceration and overcrowding mean that those in detention live in very crammed surroundings, thereby leading to a serious infringement of their right to privacy.[109] The independent expert on the situation of human rights in Haiti has reported that the severity of overcrowding in detention facilities is such that each detainee has no more than 40cm^2 of living space.[110] The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment reported situations in which inmates have to lie head to toe in a foetal position, sleep in shifts or sitting up, owing to the lack of space as a result of overcrowding.[111] Many detainees also lack privacy even for such basic functions as using toilet facilities.[112]

28. Overcrowding may lead to restrictions upon the right to maintain contacts with relatives because facilities usually allocated for family visits may be reallocated for other purposes owing to overcrowding. Moreover, some countries resort to so-called "balancing" programmes whereby detainees are reallocated to different places of detention in order to alleviate problems of overcrowding. This results in detainees being moved far away from their families, adversely impacting their visit entitlements.[113] This infringes not only upon detainees' human rights but also on those of their family members. It may also have negative impact upon the fair trial rights as detainees are moved far from the courts and legal services.

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[103] See A/HRC/25/60/Add.1, para. 85; A/HRC/22/53/Add.2, para. 47; and *Pacheco Teruel et al. v. Honduras*, Inter-American Court of Human Rights Judgement (2012), para. 96.

[104] See A/60/399, para. 73.

[105] See www.achpr.org/files/sessions/37th/mission-reports/prisons-2004/misrep_specmec_priso_southafrica_2004_eng.pdf, p. 46.

[106] See A/HRC/10/8/Add.2, para. 53.

[107] See A/60/399, para. 70.

[108] See A/HRC/4/21/Add.1, paras. 23 and 58-60; and A/HRC/10/8/Add.2, para. 53.

[109] See A/HRC/25/71, para. 35.

[110] See A/HRC/25/71, para. 32.

[111] See A/HRC/25/60/Add.1, para. 43.

[112] See *Montero-Aranguren v. Venezuela*, Inter-American Court of Human Rights Judgement (2006), para. 99.

[113] See CPT/Inf (2014) 13, para. 111.

29. Furthermore, overincarceration may negatively affect family members who lose the main breadwinner, thereby adversely impacting on the best interests of the affected child or children.[114]

H. Right to equality and non-discrimination

30. The effects of overincarceration and overcrowding in places of detention are especially negative for members of groups such as women,[115] children,[116] persons with disabilities,[117] racial minorities[118] and indigenous peoples,[119] and non-citizens. Owing to overstretched resources, the specific needs of persons belonging to these groups cannot be addressed. Failure to separate pretrial detainees from others,[120] adults from children[121] and men from women[122] has been alleged to lead to exploitation and sexual violence.[123] The specific needs of women and girls in relation to their right to health are disregarded,[124] in particular in the case of pregnant women, girls and nursing mothers.[125] There are reports of young children being detained with their mothers[126] and failure to respect the special needs of children in detention.[127] Places of detention are reported to have insufficient number of female[128] or minority[129] staff, which impacts adversely upon women[130] and members of minorities in detention. Furthermore, persons with disabilities are held in environments that include areas inaccessible to them[131] and often prisoners with mental illnesses are not separated from others.[132]

31. Overcrowding and the associated failure to address the needs of the members of these groups in detention has made them particularly vulnerable to violence,[133] and can lead

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[114] See www.achpr.org/files/sessions/37th/mission-reports/prisons-2004/misrep_specmec_priso_southafrica_2004_eng.pdf, chapter F(1); and *M v. The State*, Constitutional Court of South Africa Judgement (2007). See also CRC/C/GC/14, para. 69.

[115] See CEDAW/C/BRA/CO/7, para. 32.

[116] See CAT/C/LKA/CO/3-4, para. 14, and A/HRC/28/68, para. 41. See also *Juvenile Reeducation Institute v. Paraguay*, Inter-American Court of Human Rights Judgement (2004), para. 175.

[117] See A/68/295, para. 45.

[118] See www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16257&LangID=E.

[119] See CAT/OP/NZL/1, para. 33.

[120] See CAT/C/GAB/CO/1, para. 17; CAT/C/MUS/CO/3, para. 14; CAT/C/LKA/CO/3-4, para. 14; and CCPR/C/MOZ/CO/1, para. 14.

[121] See E/C.12/LKA/CO/2-4, para. 32; www.achpr.org/files/sessions/12th-eo/mission-reports/promotion_mission-2012/mission_report_mauritania_cpta_eng.pdf, para. 38; CAT/C/BLR/CO/4, para. 19; CAT/C/SYR/CO/1, para. 30.

[122] See CAT/C/KHM/CO/2, para. 19, and CCPR/C/BDI/CO/2, para. 18.

[123] See SRT.A/HRC/28/68, para. 68; *Juvenile Reeducation Institute v. Paraguay*, Inter-American Court of Human Rights Judgement (2004), para. 175; CAT/C/BOL/CO/2, para. 18; and A/HRC/28/68, para. 58.

[124] See A/HRC/22/50/Add.2, para. 13; CEDAW/C/BRA/CO/7, para. 32; and www.achpr.org/files/sessions/37th/mission-reports/ethiopia/misrep_specmec_priso_ethopia_2004_eng.pdf, p. 33.

[125] See CEDAW/C/BRA/CO/7, para. 32-33.

[126] See CAT/C/KEN/CO/2, para. 12, and CAT/C/RWA/CO/1, para. 19.

[127] See CAT/OP/MEX/1, para. 187.

[128] See CPT/Inf (2014) 13, para. 53, and CAT/C/KHM/CO/2, para. 19.

[129] See CPT/Inf (2014) 13, para. 53.

[130] See CPT/Inf (2014) 13, para. 53.

[131] See A/68/295, para. 45.

[132] See CAT/OP/HND/1, para. 191.

[133] See CAT/OP/PRY/1, para. 148, and Council of Europe document CPT/Inf (2015) 12, para. 54. See also www.achpr.org/files/sessions/52nd/inter-act-reps/185/activty_report_prisons_eng.pdf, p. 15.

to violations of their human rights, including detainees' right to life[134] as well as safety and security of their family members, who may become victims of extortion.[135] Furthermore, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has noted that, in severely overcrowded prisons, meaningful activities such as work, education and recreation are only made available to "a few privileged prisoners who 'cooperate' and/or pay the necessary corruption fees".[136]

III. The main causes of overincarceration and overcrowding

32. The main causes of overincarceration and overcrowding include deficiencies within the criminal justice system; excessive recourse to pretrial detention; absence and/or improper administration of alternatives to detention; specific sentencing policies; and lack of oversight over the places of detention.

A. Deficiencies within the criminal justice system

33. The European Committee for the Prevention of Torture noted that it had encountered high incarceration rates and resultant severe prison overcrowding and argued that "the fact that a State locks up so many of its citizens cannot be convincingly explained away by a high crime rate; rather, the general outlook of members of the law enforcement agencies and the judiciary must, in part, be responsible".[137] An effective criminal justice system[138] with all actors — including the police, prosecution, defence lawyers and the judiciary — working efficiently and according to the rule of law and requirements under international human rights law is essential to ensure that the cases of persons who come in contact with this system are dealt with efficiently and in accordance with the law. In reality, however, criminal justice systems around the world encounter major challenges and shortcomings.

34. The so-called "zero tolerance polices" adopted in many States have led to a high increase in the number of arrests,[139] even for minor offences such as drunkenness, crossing the railway, or shoplifting,[140] and to people being held in custody for long periods.[141] Moreover, some practices, such as police being rewarded for making arrests,[142] and overbroad legislation, rules and regulations[143] have reportedly led to arbitrary arrests. In turn, this situation has contributed significantly to overincarceration and overcrowding.

35. Following arrest, the efficiency with which authorities are able to deal with the case of each detainee is crucial to reducing overcrowding and overincarceration. Pretrial

[134] See CAT/C/AUS/CO/4-5, para. 11.
[135] See CAT/C/MEX/CO/5-6, para. 19.
[136] See A/HRC/13/39/Add.5, para. 234.
[137] See Council of Europe document CPT/Inf/C (2002) 1 [Rev. 2015] Section. 7/86, para. 28.
[138] See A/HRC/25/60/Add.1, para. 84.
[139] See Council of Europe document CPT/Inf (2014) 13, para. 37; www.ohchr.org/Documents/Issues/RuleOfLaw/Overincarceration/ACLU.pdf; www.ohchr.org/Documents/Issues/RuleOfLaw/Overincarceration/CNDH_Mexico.pdf; and www.ohchr.org/Documents/Issues/RuleOfLaw/Overincarceration/PDDH_Nicaragua.pdf.
[140] See www.achpr.org/files/sessions/37th/mission-reports/prisons-2004/misrep_specmec_priso_southafrica_2004_eng.pdf,chapter F(1).
[141] See A/HRC/19/57/Add.2, para. 38.
[142] See CAT/OP/MEX/1, para. 182.
[143] See CCPR/C/HND/CO/1, para. 13; *Pacheco Teruel et al. v. Honduras*, Inter-American Court of Human Rights Judgement (2012), para. 101; and www.ohchr.org/Documents/Issues/RuleOfLaw/Overincarceration/BCHR_BIRD_ADHRB.pdf.

detention is often prolonged owing to inadequate police investigations, lost case files and a shortage of judges. In many States, there are huge backlogs of cases, especially involving pretrial detention, and an urgent need to increase judicial capacity to deal with these.[144] Furthermore, owing to lack of resources and trained officers, alternative measures and parole systems are not implemented.[145] The efficiency of the criminal justice system is also negatively impacted by inappropriate communication systems between prosecutors, public defenders and judges.[146] These deficiencies within the criminal justice system also mean that the status of those in detention is not reviewed at regular intervals.[147] Furthermore, many States lack comprehensive and well-resourced legal aid programmes.

36. Moreover, many individuals remain in detention owing to the absence of centralized registers and the lack of an effective system to monitor the length of pretrial detention or progress in the implementation of sentencing.[148] In the absence of such registers, and with poor communication between criminal justice actors,[149] authorities simply lack accurate knowledge about who is due to be released. This not only prolongs pretrial detention but also keeps those who have already completed their sentence in custody, thereby contributing to overcrowding.[150]

B. Excessive recourse to pretrial detention

37. The Subcommittee on Prevention of Torture has stated that the excessive use and length of pretrial detention is a major cause of overcrowding,[151] and that the overuse and misuse of pretrial detention needs to be tackled as a matter of priority.[152] Other international[153] and regional[154] bodies have also reported an excessive recourse to pretrial detention, a measure that should only be a last resort and subject to certain conditions,[155] but that in practice is often applied even to such minor cases as theft of a mobile telephone,[156] a pen or a chicken.[157] In some countries, pretrial detainees reportedly

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[144] See CAT/C/KEN/CO/2, para. 15; CAT/C/TGO/CO/2, para. 12; A/HRC/19/57, para. 36; A/HRC/25/71, paras. 34 and 41; and www.achpr.org/files/sessions/37th/mission-reports/ethiopia/misrep_specmec_priso_ethopia_2004_eng.pdf, p. 52.

[145] See A/HRC/25/60/Add.1, paras. 84, 99; and www.ohchr.org/Documents/Issues/RuleOfLaw/Overincarceration/PDH_Guatemala.pdf.

[146] See CAT/OP/HND/1, para. 184; CAT/OP/PRY/2, para. 33.

[147] See CAT/OP/BEN/1, para. 160; CAT/OP/HND/1, para. 184.

[148] See *Montero-Aranguren v. Venezuela*, Inter-American Court of Human Rights Judgement (2006), para. 60(9); CAT/C/KHM/CO/2, para. 19.

[149] See CAT/OP/PRY/2, para. 33; CAT/OP/HND/1, para. 184.

[150] See CAT/C/RWA/CO/1, para. 19; CAT/OP/BEN/1, para. 161; CAT/OP/PRY/1, para. 46.

[151] See CAT/C/54/2, para. 77; and www.ohchr.org/Documents/Issues/RuleOfLaw/Overincarceration/CNCPPDH_Algeria.pdf.

[152] See CAT/C/46/2, para. 52; and CAT/C/54/2, para. 83.

[153] See CAT/C/TGO/CO/2, para. 12; A/HRC/25/60/Add.1, para. 84; E/CN.4/2004/56, para. 49; A/HRC/19/57, para. 48; and CCPR/C/TUR/CO/1, para. 17.

[154] See www.achpr.org/files/sessions/37th/mission-reports/ethiopia/misrep_specmec_priso_ethopia_2004_eng.pdf, p. 24; www.achpr.org/files/sessions/37th/mission-reports/prisons-2004/misrep_specmec_priso_southafrica_2004_eng.pdf, Chapter F; Council of Europe document CPT/Inf (2014) 15, para. 126; and CPT/Inf/C (2002) 1 [Rev. 2015] Section: 7/86, para. 28.

[155] See CAT/C/54/2, para. 84; and Council of Europe document CPT/Inf (2014) 31, para. 56.

[156] See CAT/OP/MLI/1, para. 29.

[157] See www.achpr.org/files/sessions/52nd/inter-act-reps/185/activty_report_prisons_eng.pdf, p. 10.

constitute the majority of the prison population,[158] and over 90 per cent of detainees in some settings.[159]

C. Absence and/or improper administration of alternatives to detention

38. According to the Special Rapporteur on Prisons and Conditions of Detention of the African Commission on Human and Peoples' Rights, the "increase in prison population cannot alone be attributed to higher rates in crime. Simply put, in most jurisdictions, there is the belief that prison is preferable to any alternative; thus, the punitive element that characterizes this sanction remains the cornerstone of modern day correctional and penal systems. In spite of the proven efficiency and effectiveness of non-custodial alternatives, harsher penalties in the form of longer prison sentences continue to be imposed".[160]

39. This view is shared by other international[161] and regional[162] bodies who point to the absence of alternatives to detention or shortcomings in their implementation as a significant contributor to overincarceration and overcrowding. Further contributing factors are the unavailability, dysfunctionality or excessively onerous conditions of bail;[163] the ineffectiveness of the probation service and little recourse to parole;[164] the absence of or a poorly functioning system of alternatives to detention, including community service,[165] electronic supervision and house arrest;[166] and the reluctance of prosecutorial and judicial authorities to employ non-custodial sentences,[167] or the lack of their availability to the judiciary, especially in less serious cases, and lack of encouragement to use those options.[168]

D. Sentencing policies

40. The policies that a State puts in place in response to crime have direct implications for the number of detainees and the length of time that they spend in detention. So-called "zero tolerance policies" have increased the number of criminal convictions with custodial sentences and — coupled with the low acquittal rate and common use of detention — have led to overcrowding in prisons.[169]

41. As stated by the Working Group on Arbitrary Detention, "[m]any countries have seen an increasingly rapid rate of legislative response to criminal acts, and are now

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[158] See CAT/C/TGO/CO/2, para. 12, and www.ohchr.org/Documents/Issues/RuleOfLaw/Overincarceration/OSJI.pdf.

[159] See A/HRC/25/71, para. 33.

[160] See www.achpr.org/files/sessions/37th/mission-reports/prisons-2004/misrep_specmec_priso_southafrica_2004_eng.pdf, p. 2.

[161] See CAT/OP/BRA/1, para. 96; CCPR/C/AGO/CO/1, para. 19; A/HRC/25/60/Add.1, para. 84; and CAT/C/KHM/CO/2, para. 19.

[162] See Council of Europe document CPT/Inf (2014) 29, para. 33.

[163] See CAT/OP/MDV/1, para. 169; CAT/C/KEN/CO/2, para. 15; and www.achpr.org/files/sessions/37th/mission-reports/ethiopia/misrep_specmec_priso_ethopia_2004_eng.pdf, p. 52.

[164] See CCPR/C/AGO/CO/1, para. 19; A/HRC/25/60/Add.1, para. 84; and Council of Europe document CPT/Inf (2014) 18, para. 35.

[165] See www.achpr.org/files/sessions/37th/mission-reports/prisons-2004/misrep_specmec_priso_southafrica_2004_eng.pdf, Chapter F(i).

[166] See CPT/Inf (2014) 29, para. 33.

[167] See CPT/Inf (2014) 18, para. 35.

[168] See CPT/Inf (2014) 21, para. 42.

[169] See A/HRC/19/57/Add.2, para. 38.

beginning to experience the combined effects of habitual offender laws, generally increased minimum sentences with less discretion available to judges in each individual case, and post-conviction preventive detention",[170] which leads to overincarceration and overcrowding.

42. The following phenomena have been reported as factors contributing to overincarceration and overcrowding: the failure to include time served on custodial remand in sentence calculation;[171] the application of mandatory sentences especially for minor, non-violent crimes[172] and severe penalties for drug-related offences;[173] the imposition of excessively lengthy prison sentences, especially life sentences,[174] contrary to the principle of proportionality;[175] the absence of reasonable sentencing guidelines that would permit the reduction of excessively lengthy sentences;[176] the lack of discretion for judges when sentencing, which prevents them from taking into consideration the individual circumstances of the detainee and the case;[177] a great limitation to the remission of sentences;[178] and ambiguities in the legislation that lead to unnecessary detention.[179]

E. Lack of oversight of places of detention

43. Lack of oversight of places of detention is also a factor contributing to overincarceration and overcrowding. There are reports of improper record keeping in places of detention even to the extent that authorities do not know the exact number of detainees held at any given time or their status,[180] and are unaware of their living conditions. At times, beds are so close together that, at full capacity or even at somewhat below capacity, living conditions would still be extremely precarious.[181] Owing to infrequent or absent visits to places of detention, prosecutors and/or the judiciary[182] lack proper understanding of the levels of overcrowding and consequences of overincarceration. They are therefore unable to take this factor into consideration when making decisions regarding detention, sentencing or release.

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[170] See A/HRC/27/48, para. 73.
[171] See CAT/OP/MDV/1, para. 220.
[172] See A/HRC/25/60/Add.1, para. 99, and www.ohchr.org/Documents/Issues/RuleOfLaw/Overincarceration/PRI.pdf.
[173] See A/HRC/10/44, para. 55, and www.ohchr.org/Documents/Issues/RuleOfLaw/Overincarceration/ACLU.pdf.
[174] See www.achpr.org/files/sessions/37th/mission-reports/prisons-2004/misrep_specmec_priso_southafrica_2004_eng.pdf, Chapter F(i), and www.ohchr.org/Documents/Issues/RuleOfLaw/Overincarceration/PRI.pdf.
[175] See CAT/OP/MDV/1, para. 220.
[176] See A/HRC/25/60/Add.1, para. 99.
[177] See A/HRC/27/48, para. 73.
[178] See A/HRC/25/60/Add.1, para. 84.
[179] See *Pacheco Teruel et al. v. Honduras*, Inter-American Court of Human Rights Judgement (2012), para. 105.
[180] See A/HRC/22/53/Add.2, para. 46, and CAT/OP/BEN/1, para. 161.
[181] See A/HRC/25/60/Add.1, para. 40.
[182] See CAT/OP/MLI/1, para. 29.

IV. Addressing overincarceration and overcrowding and their human rights implications

A. Need for a proactive and holistic approach

44. Overincarceration and overcrowding cannot be tackled overnight, and the complexity of these phenomena requires a combination of legislative, administrative, political and economic measures, including a comprehensive policy and an action plan to implement it. This view is shared by national institutions,[183] regional mechanisms[184] and international bodies.[185] Both regional and international bodies have pointed out that, while measures such as the construction of new and the renovation of existing detention facilities may provide an immediate, short-term relief to the overcrowding problem, they have not been found to constitute an effective and lasting solution.[186]

45. As stated by the European Committee for the Prevention of Torture, the only viable way to control overcrowding is to adopt policies designed to limit or moderate the number of persons sent to prison.[187] In order to achieve this, the Committee argues in favour of a more concerted, holistic and proactive approach, based on wide-ranging discussions involving all relevant parties, including parliamentarians, prosecutors, judges and representatives of monitoring bodies.[188]

B. Right to challenge detention, assistance by legal counsel and access to legal aid

46. The Working Group on Arbitrary Detention, in its Draft Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court, has stated that the right to challenge detention is a judicial remedy designed to protect personal freedom and physical integrity and that it is a non-derogable right.[189]

47. The right to challenge detention is an important tool for addressing the problem of overcrowding given accounts of individuals being detained illegally, or when the pretrial detention limits are not respected or indeed prisoners are not promptly released after serving their sentence.[190] In order to make this right effective, every detainee must be able to take proceedings before an independent court, without substantial delay,[191] and to appear before the court in person. Furthermore, the burden of establishing the legal basis, as well

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[183] See www.ohchr.org/Documents/Issues/RuleOfLaw/Overincarceration/NCHR_Greece.pdf.

[184] See *Neptune v. Haiti*, Inter-American Court of Human Rights Judgement (2008), para. 183, and Council of Europe document CPT/Inf (2014) 31, para. 56; www.achpr.org/files/sessions/52nd/inter-act-reps/185/activty_report_prisons_eng.pdf, p. 22.

[185] See S/2015/157, para. 26; A/HRC/25/71, paras. 41-42; CAT/OP/BEN/1, para. 158; CAT/OP/ARG/1, para. 59; www.ohchr.org/Documents/Issues/RuleOfLaw/OverIncarceration/UNODC.pdf.

[186] See www.achpr.org/files/sessions/37th/mission-reports/prisons-2004/misrep_specmec_priso_southafrica_2004_eng.pdf, p. 64; CPT/Inf (2013) 35, para. 8; CPT/Inf (2014) 31, para. 35; CAT/C/IRL/CO/1, para. 11; CCPR/C/BIH/CO/2, para. 11; A/HRC/25/60/Add.1, para. 84; CCPR/C/URY/CO/3, para. 9; CAT/OP/MDV/1, para. 220.

[187] See Council of Europe document CPT/Inf (2014) 13, para. 39.

[188] See ibid., and www.ohchr.org/Documents/Issues/RuleOfLaw/Overincarceration/OSJI.pdf.

[189] See A/HRC/30/37, para. 2, and Principle 4.

[190] See CCPR/C/TUR/CO/1, para. 17, and www.ohchr.org/Documents/Issues/RuleOfLaw/Overincarceration/QUNO.pdf.

[191] See A/HRC/27/47, para. 16.

as the reasonableness, necessity and proportionality of detention, lies with the authorities responsible for the detention.[192]

48. Moreover, the Draft Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court provide that anyone deprived of their liberty shall, at any time during their detention, have the right to legal assistance by counsel of choice and access to legal aid.[193] While lawyers are the first providers of legal aid, the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems also suggest that States involve a wide range of stakeholders as legal aid service providers, including non-governmental organizations, community-based organizations, religious and non-religious charitable organizations, professional bodies and associations, academia and paralegals.[194]

C. Appropriate use of places of detention

49. The specific purpose for which detention places, including prisons and police stations, are built or established[195] needs to be taken into account when persons are detained. Facilities such as police stations must be used exclusively for short detention as these are not suited to extended custody and lack the necessary space, sanitation and other facilities required to ensure adequate conditions of detention.[196] The capacity of places of detention must be assessed realistically and any such assessment must be based on allocation of reasonable space for each detainee.[197] Ensuring an effective register system for tracking the detention period of each pretrial and sentenced detainee is essential to allow detention places to manage their capacities.[198] Finally, all detention places should be staffed adequately so that they can be run effectively and with due respect to the human rights of those detained.

50. Equally, the negative impact of overcrowding is exacerbated for individuals held in detention places that are not suitable for their specific needs, such as children, women, elderly persons, persons with disabilities and mentally ill.[199] Furthermore, persons who are remanded in custody or sentenced should not continue to be detained in police stations, unlike the practice in some States due to the overcrowding in many prisons.[200]

51. In addition, administrators of places of detention should not be left to cope with the phenomenon of overcrowding[201] and there should be an effective communications system between the various actors of the criminal justice system to ensure that detention places are

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192 See A/HRC/30/37, Principle 13.

193 See A/HRC/30/37, Principle 9.

194 See General Assembly resolution 67/187, annex, paras. 9 and 10; www.ohchr.org/Documents/Issues/RuleOfLaw/Overincarceration/OSJI.pdf; www.ohchr.org/Documents/Issues/RuleOfLaw/Overincarceration/PRI.pdf.

195 However, there are also reports of detainees being held in places which have never been intended for detention use, which considerably adds to the problems caused by overcrowding. See www.achpr.org/files/sessions/12th-eo/mission-reports/promotion_mission-2012/mission_report_mauritania_cpta_eng.pdf, para. 75.

196 See A/HRC/13/39/Add.5, para. 91.

197 See A/HRC/22/53/Add.2, para. 46, and A/HRC/25/60/Add.1, para. 40.

198 See CAT/OP/PRY/1, para. 46; CAT/C/TGO/CO/2, para. 13; and CAT/OP/BEN/1, para. 161.

199 See CAT/C/GBR/CO/5, para. 31; CCPR/C/FIN/CO/6, para. 10; A/HRC/28/68, para. 41. See also the African Commission on People's and Human Rights, Report of Promotion Mission to Nigeria (2009), available from www.achpr.org/states/nigeria/missions/promo-2009/; and www.ohchr.org/Documents/Issues/RuleOfLaw/Overincarceration/CRIN.pdf.

200 See Council of Europe document CPT/Inf (2014) 26, para. 13.

201 See Council of Europe document CPT/Inf (2014) 13, para. 39.

not expected to hold people beyond their capacities. Practices such as a legal prohibition on overcrowding[202] should be considered favourably.

D. Pretrial detention as a last resort

52. Since excessive recourse to pretrial detention is one of the major causes of overincarceration and overcrowding around the world,[203] strict adherence to relevant international norms and standards will go a long way in addressing these phenomena. Pretrial detention should only be a measure of last resort.[204]

53. Furthermore, as stressed by the Human Rights Committee in its general comment No. 35, "[d]etention pending trial must be based on an individualized determination that it is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime".[205] This means that pretrial detention should not be mandatory without regard to individual circumstances,[206] a practice common in some States,[207] and that alternatives to pretrial detention must be duly considered also when deciding upon continued pretrial detention. The time limits imposed for pretrial detention must be strictly observed.[208] Moreover, if the length of time that the defendant has been detained for reaches the length of the longest sentence that could be imposed for the crimes charged, the defendant should be released.[209]

E. Alternatives to custodial measures

54. Against the background of international standards on non-custodial measures,[210] one of the key recommendations of international,[211] regional[212] and national bodies[213] regarding the reduction of overincarceration and overcrowding rates is to develop a policy to increase resort to non-custodial measures and to alternatives to custodial sentences. As stated by the European Committee for the Prevention of Torture, "a strategy for the sustainable reduction of the prison population should be put in place, which ensures that imprisonment is in

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202 See www.ohchr.org/Documents/Issues/RuleOfLaw/Overincarceration/Germany.pdf.

203 See CAT/C/54/2, para. 83.

204 See articles 9 and 14 of the International Covenant on Civil and Political Rights. See also rules 6.1 and 6.2 of the United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules); CCPR/C/GC/35, para. 38; and A/HRC/19/57, para. 48.

205 See CCPR/C/GC/35, para. 38.

206 See CCPR/C/GC/35, para. 38.

207 See CCPR/C/GC/35, para. 37.

208 See www.ohchr.org/Documents/Issues/RuleOfLaw/Overincarceration/LICAMDH_Cameroon.pdf.

209 See CCPR/C/GC/35, para. 38; CAT/OP/MLI/1, para. 30.

210 See United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules), A/RES/45/110, annex; United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), A/RES/65/229, annex.

211 See CAT/C/ARM/CO/3, para. 19; CAT/C/BLR/CO/4, para. 19; CAT/C/FIN/CO/5-6, para. 14; CAT/C/GTM/CO/5-6, para. 18; CAT/C/KEN/CO/2, para. 12; CAT/C/SYR/CO/1, para. 30; E/CN.4/2004/56, para. 49; CCPR/C/IND/CO/1, para. 21; CCPR/C/PHL/CO/4, para. 19.

212 See Council of Europe document CPT/Inf (2015) 12, para. 44; www.achpr.org/files/sessions/37th/mission-reports/ethiopia/misrep_specmec_priso_ethopia_2004_eng.pdf, p. 45.

213 See www.ohchr.org/Documents/Issues/RuleOfLaw/Overincarceration/Serbia.pdf; www.ohchr.org/Documents/Issues/RuleOfLaw/Overincarceration/SUHAKAM_Malaysia.pdf.

practice the measure of last resort at all stages of the criminal justice system, from pretrial to the execution of sentences".[214]

55. In order to render alternatives to detention effective, there must be a variety of measures available at pretrial and conviction stage, such as affordable bail,[215] automatic bail for most offences,[216] monetary fines, electronically monitored house arrest,[217] community service, juvenile punishment and supervision of paroles[218] as well as remission or commutation of sentences and parole or pardon system.[219] Eligibility criteria for all these alternative measures should be reviewed so as to widen their scope of application.[220] In particular, it is crucial that alternatives to custodial measures are duly considered for such groups as women, elderly, children and people with disabilities.[221]

56. However, alternatives to detention should not only be provided for in legislation, but also implemented in practice.[222] In order to ensure that there is support from the prosecutorial services, the judiciary and the public, it is essential that the system of alternatives to detention is run efficiently[223] and is adequately resourced.

F. Proportionate sentencing

57. Proportionate sentencing is an essential requirement of an effective and fair criminal justice system. This requires that custodial sentences are imposed as measures of last resort and applied proportionately to meet a pressing societal need.[224]

58. In order to meet the requirement of proportionality, States have been revising their penal policies and legislation in order to reduce minimum and maximum penalties,[225] decriminalize numerous categories of petty crimes and reduce criminal sanctions for economic offences,[226] thus contributing to reducing the total prison population.[227] Equally, reviewing sentencing policies to reduce or eliminate mandatory minimum sentences for lesser, non-violent offences and to provide more reasonable sentencing guidelines in order to reduce excessively lengthy sentences also has had a positive effect upon the reduction of overincarceration and overcrowding.[228] Appropriate action, including training, should be taken vis-à-vis the prosecutorial and judicial authorities with a view to eliminating unnecessary recourse to pretrial custody and modifying the sentencing practices.[229] Special

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[214] See Council of Europe document CPT/Inf (2014) 31, para. 56. See also CAT/OP/NZL/1, para. 33.
[215] See www.achpr.org/files/sessions/52nd/inter-act-reps/185/activty_report_prisons_eng.pdf, p. 22.
[216] See Council of Europe document CPT/Inf(2014) 15, para. 98.
[217] See www.ohchr.org/Documents/Issues/RuleOfLaw/Overincarceration/Germany.pdf.
[218] See www.ohchr.org/Documents/Issues/RuleOfLaw/Overincarceration/OPO_Finland.pdf.
[219] See A/HRC/25/60/Add.1, para. 99.
[220] See A/HRC/25/60/Add.1, para. 99.
[221] See CRC/C/AZE/CO/3-4, para. 75; A/HRC/22/53/Add.2, para. 92; A/HRC/28/68, para. 39; and www.ohchr.org/Documents/Issues/RuleOfLaw/Overincarceration/QUNO.pdf.
[222] See www.ohchr.org/Documents/Issues/RuleOfLaw/Overincarceration/CNDH_Mexico.pdf.
[223] See www.ohchr.org/Documents/Issues/RuleOfLaw/Overincarceration/NCHR_Slovakia.pdf.
[224] See E/CN.4/2006/7, para. 63; and CAT/OP/MDV/1, para. 220.
[225] See CAT/C/MDA/CO/2, para. 18.
[226] See Council of Europe document CPT/Inf (2014) 15, para. 98.
[227] See www.ohchr.org/Documents/Issues/RuleOfLaw/Overincarceration/RussianFederation.pdf; and www.ohchr.org/Documents/Issues/RuleOfLaw/Overincarceration/Kazakhstan.pdf.
[228] See A/HRC/25/60/Add.1, para. 84.
[229] See A/HRC/25/60/Add.1, para. 99; and Council of Europe document CPT/Inf (2015) 12, para. 44. See also www.achpr.org/files/sessions/37th/mission-reports/prisons-2004/misrep_specmec_priso_southafrica_2004_eng.pdf, para. F(1).

attention should be paid to the reduction of life sentences and ensuring a genuine possibility of parole for all detainees, including those serving life sentences.[230]

G. Rehabilitation and reduction of reoffending rates

59. Providing effective rehabilitation services while in custody and following release as well as addressing reoffending are important factors in reducing overcrowding.[231] Targeted crime-prevention programmes aimed at specific groups must be considered.[232]

60. Addressing reoffending rates is a complex task requiring a policy of reintegration into society of former detainees[233] and involvement from families[234] as well as the community concerned,[235] so as to ensure effective reintegration. Further measures, such as drug rehabilitation programmes in order to reduce the risk of reoffending, should be considered favourably.[236]

H. Oversight and complaints mechanisms

61. Regular monitoring of places of detention is an important factor in addressing the issues of overincarceration and overcrowding, as it increases transparency and efficiency of the prison system[237] and makes it possible to detect and combat the phenomena.[238] Moreover, it is important that monitoring be carried out by a variety of relevant bodies and institutions.

62. Oversight by the prosecutors and judiciary is important so that they are cognizant of the prevalent conditions when taking decisions about detention.[239] It is also hoped that the draft Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court will help to establish effective mechanisms to ensure judicial oversight over all situations of deprivation of liberty.[240] Inspections carried out by various professional bodies to ensure observance of such standards as health and safety, building standards, hygiene and sanitation are paramount.[241] Independent oversight by mechanisms such as national preventive mechanisms, national

[230] See *Vinter and others v. U.K.*, European Court of Human Rights Judgement (2013).
[231] See CAT/OP/MLI/1, para. 67, CAT/OP/BEN/1, para. 151; and CAT/C/GBR/CO/5, para. 31. See also www.achpr.org/files/sessions/52nd/inter-act-reps/185/activty_report_prisons_eng.pdf, pp. 21 and 22; www.ohchr.org/Documents/Issues/RuleOfLaw/Overincarceration/CHR_Philippines.pdf; www.ohchr.org/Documents/Issues/RuleOfLaw/Overincarceration/SUHAKAM_Malaysia.pdf; and www.ohchr.org/Documents/Issues/RuleOfLaw/Overincarceration/RussianFederation.pdf.
[232] See CEDAW/C/BRA/CO/7, para. 32.
[233] See Council of Europe document CPT/Inf (2015) 12, para. 44; CPT/Inf (2015) 6, para. 46; and www.ohchr.org/Documents/Issues/RuleOfLaw/Overincarceration/ElSalvador.pdf.
[234] See www.ohchr.org/Documents/Issues/RuleOfLaw/OverIncarceration/UNODC.pdf.
[235] See CAT/OP/NZL/1, paras. 33 and 34; and www.ohchr.org/Documents/Issues/RuleOfLaw/OverIncarceration/UNODC.pdf.
[236] See CAT/OP/MDV/1, para. 220.
[237] See www.achpr.org/files/sessions/52nd/inter-act-reps/185/activty_report_prisons_eng.pdf, p. 23.
[238] See Council of Europe document CPT/Inf (2014) 15, para. 100.
[239] See CAT/OP/MLI/1, para. 29, and A/HRC/19/57, para. 36.
[240] See www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16257&LangID=E.
[241] See www.ohchr.org/Documents/Issues/RuleOfLaw/OverIncarceration/UNODC.pdf.

human rights institutions and civil society contributes to monitoring the overcrowding and assisting authorities with its reduction.[242]

63. The existence and proper functioning of independent complaints mechanisms fully accessible to detainees is also extremely important in order to alleviate overcrowding, overincarceration and their negative effects.[243]

V. Conclusions

64. **When resorting to deprivation of liberty, States infringe upon one of the core human rights: the liberty of person. In order to justify such interference, States should apply deprivation of liberty as a measure of last resort and only after alternatives have been duly considered.**

65. **However, when deprivation of liberty is absolutely necessary, the State bears special responsibility towards those it detains. This entails an obligation to treat all prisoners with respect due to their inherent dignity and value as human beings, the very first requirement of the United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules).**[244]

66. **The overuse of detention overstretches the often scarce prison resources, puts detention staff in extremely difficult, even dangerous conditions, and has serious implications on the human rights of persons deprived of their liberty. Moreover, overincarceration also constitutes one of the major underlying causes of overcrowding, which results in conditions that can amount to ill-treatment or even torture.**[245]

67. **In order to address overincarceration and overcrowding and their human rights implications, several recommendations are made in section IV of the present document, including to adopt a proactive and holistic approach; ensure respect for detainees' right to challenge detention, to be provided with assistance by legal counsel and to have access to legal aid; use places of detention only for the purpose for which they are fit; use pretrial detention only as a last resort; develop and implement alternatives to custodial measures during pretrial and post-conviction; review penal policies and legislation to ensure proportionate sentencing; provide effective rehabilitation services to contribute to reducing reoffending rates; and ensure the existence and proper functioning of independent oversight and complaints mechanisms.**

68. **Since deprivation of liberty by its very nature increases social disadvantage and vulnerability to human rights violations, steps taken by States to fulfil and protect the rights of those it detains are of immense significance.**[246] **Proactive steps to address the phenomena of overincarceration and overcrowding in places of detention not only ensure that States comply with their international obligations, but also guarantee detainees the dignity inherent to every human being.**

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[242] See A/HRC/25/60/Add.1, para. 39; CAT/C/IRL/CO/1, para. 11; and CCPR/C/KAZ/CO/1, para. 17. See also www.ohchr.org/Documents/Issues/RuleOfLaw/Overincarceration/LICAMDH_Cameroon.pdf.

[243] CCPR/C/AGO/CO/1, para. 19; CCPR/C/BDI/CO/2, para. 18; and CCPR/C/TCD/CO/2, para. 18.

[244] E/CN.15/2015/L.6/Rev.1, annex, Rule 1.

[245] A/68/295, para. 86.

[246] A/HRC/11/8, para. 29.